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No. 97682-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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NORTHWEST ALLOYS, INC. and MILLENNIUM BULK  
TERMINALS-LONGVIEW, LLC,

Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES and THE HONORABLE HILARY S. FRANZ, and  
COLUMBIA RIVERKEEPER, WASHINGTON ENVIRONMENTAL  
COUNCIL, and SIERRA CLUB,

Respondents.

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**COLUMBIA RIVERKEEPER, WASHINGTON  
ENVIRONMENTAL COUNCIL, AND SIERRA CLUB'S JOINDER  
IN STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES' AND THE HONORABLE HILARY S. FRANZ'S  
ANSWER TO PETITION FOR REVIEW**

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MARISA C. ORDONIA, WSBA # 48081  
KRISTEN L. BOYLES, WSBA # 23806  
JAN E. HASSELMAN, WSBA # 29107  
Earthjustice  
810 Third Avenue, Suite 610  
Seattle, WA 98104  
Ph: (206) 343-7340  
Fax: (206) 343-1526  
mordonia@earthjustice.org  
kboyles@earthjustice.org  
jhasselman@earthjustice.org

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## INTRODUCTION

As steward, protector, and landlord of state-owned aquatic lands, the Washington State Department of Natural Resources (“DNR”) must manage the aquatic resources and river bed of the Columbia River for the benefit of the public. In honoring this duty, before making a decision on a request from tenant Northwest Alloys for consent to sublease aquatic lands to Millennium Bulk Terminals—Longview, DNR reasonably sought detailed financial and business information about Millennium, its business model, and its proposal to build a massive coal export terminal on the banks of the Columbia River. The Washington Legislature gave DNR the obligation to ensure that any proposed lessee or sub-lessee of state-owned aquatic lands was financially sound and would conduct its business in a responsible manner; likewise, DNR had the duty to deny consent to sublease when it was not supplied with adequate information on which to base its assessment.

DNR’s lease with Northwest Alloys specifically provided that before consenting to any sublease, DNR could consider factors such as the proposed sub-lessee’s financial condition and business reputation, as well as any “such factors as may reasonably bear upon the suitability of the transferee as a tenant of the Property.” DNR considered these factors and found Millennium sorely lacking, as detailed in the January 5, 2017 letter from then-Commissioner of Public Lands Peter Goldmark denying Northwest Alloys’ request for consent to sublease to

Millennium. The Commissioner's letter and the record before DNR highlighted the many ways that Millennium was not a suitable subtenant under the terms of the lease—of particular note were DNR's numerous requests for Millennium's financial information and Millennium's steadfast refusal to provide that information. While any responsible landlord would want details about a proposed subtenant's financial capabilities and business plan, Millennium's acknowledged shortcomings—previously misleading regulators by failing to disclose a planned increase in project size and impact, the bankruptcy of a principal project sponsor, changed circumstances in the aluminum business that Millennium serviced at the time, and a plunge in the world-wide coal export market—further spurred DNR's requests.

Given these facts, the Court of Appeals held that DNR's requests for information were reasonable, as was DNR's decision to deny consent to sublease after Millennium and Northwest Alloys refused to provide that information. Accordingly, Intervenor-Respondents Columbia Riverkeeper, Washington Environmental Council, and Sierra Club (collectively "Riverkeeper") join DNR in respectfully asking this Court to deny Northwest Alloys and Millennium's petition for review.

#### STATEMENT OF THE CASE

Riverkeeper agrees with and incorporates by reference DNR's counterstatement of the case.

## ARGUMENT FOR DENYING REVIEW

Riverkeeper concurs in DNR’s arguments opposing review and asks this Court to deny Northwest Alloys’ petition. As detailed in DNR’s answer, the Court of Appeals decision neither conflicts with prior precedent, nor does it present an issue of substantial public interest—the requirements for the Court to grant review. Moreover, the question of which standard of review courts should apply is not well presented. Although Northwest Alloys contends that the appellate court inappropriately used the arbitrary and capricious standard, as Riverkeeper argued below and as the Court of Appeals found, even under a “reasonably prudent person” standard of review, “[i]t was not unreasonable for DNR to withhold consent when NWA refused to provide requested financial information, especially in light of DNR’s legal responsibilities as manager of state-owned aquatic lands held in public trust.” *Northwest Alloys, et al. v. DNR, et al.*, No. 51677-2-II, slip op. at 19 n.7 (August 20, 2019).

The unusual facts of this case also render it an inappropriate vehicle to set statewide precedent. DNR was rightly cautious as Northwest Alloys’ prior subtenant caused extensive environmental damage to the site, putting Northwest Alloys in default of its lease. Slip op. at 3, 18-19; CP 160, AR 000025 (Notice to Cure Defaults); *see also* CP 129, AR 000001 (describing violations of lease). Indeed, Northwest Alloys remained in default when it requested consent to sublease to Millennium. Slip op. at 3; CP 280, AR 000132.

For its part, Millennium intentionally concealed the extent of its plans for the site from state regulators in an attempt to evade full review under the State Environmental Policy Act; consequently, Millennium had to withdraw its initial 2010 request for permits. Slip op. at 3-4; CP 492-96, AR 000393-97. Moreover, in addition to withholding requested financial information, Northwest Alloys and Millennium failed to inform DNR of basic factual changes such as the bankruptcy of one of Millennium's corporate parents and the shuttering of the alumina plant that Millennium was purportedly servicing. Slip op. at 5; CP 1476-77, AR 001188-89; CP 1502-06, AR 001207-11; CP 1533-34, AR 001235-36. *See also* CP 14136-14200, CP 14208-14222, AR 013694-013757, AR 013763-013777 (Jan. 2016 Arch Coal bankruptcy filings).

With these facts, and where the tenant requesting consent to sublease continuously and deliberately withheld information that it was obligated to provide to its landlord under the terms of its lease, this appeal makes an unsuitable vehicle with which to "clarify" existing law.

#### CONCLUSION

The decision of the Court of Appeals does not conflict with precedent or involve a matter of substantial public interest warranting review under RAP 13.4(b)(1), 13.4(b)(2); it does not warrant review by this Court. Accordingly, Riverkeeper joins DNR and respectfully requests this Court deny Northwest Alloys and Millennium's petition for review.

Respectfully submitted this 17<sup>th</sup> day of October, 2019.

*s/ Marisa C. Ordonia*

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MARISA C. ORDONIA, WSBA # 48081

KRISTEN L. BOYLES, WSBA # 23806

JAN E. HASSELMAN, WSBA # 29107

Earthjustice

810 Third Avenue, Suite 610

Seattle, WA 98104

Ph: (206) 343-7340 | Fax: (206) 343-1526

mordonia@earthjustice.org

kboyles@earthjustice.org

jhasselman@earthjustice.org

*Attorneys for Columbia Riverkeeper,  
Washington Environmental Council,  
and Sierra Club*



**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the forgoing document to be served on all parties or their counsel of record on October 17, 2019, through the Washington State Appellate Courts' eFiling Portal.

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 17<sup>th</sup> day of October, 2019, at Settle, Washington.

*s/ Diana Brechtel*  
\_\_\_\_\_  
Diana Brechtel  
Supervising Litigation Paralegal

# EARTHJUSTICE

October 17, 2019 - 12:32 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97682-1  
**Appellate Court Case Title:** Northwest Alloys, Inc., et al. v. State of Washington Department of Natural Resources, et al.  
**Superior Court Case Number:** 17-2-00125-3

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- 976821\_Answer\_Reply\_20191017122635SC081587\_8744.pdf  
This File Contains:  
Answer/Reply - Answer to Petition for Review  
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- jhasselman@earthjustice.org
- jsitkin@chmelik.com
- kboyles@earthjustice.org
- laura.white@klgates.com
- llarson@nossaman.com
- tedc@atg.wa.gov
- tim.hobbs@klgates.com

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Sender Name: Diana Brechtel - Email: dbrechtel@earthjustice.org

**Filing on Behalf of:** Marisa Christine Ordonia - Email: mordonia@earthjustice.org (Alternate Email: dbrechtel@earthjustice.org)

#### Address:

705 Second Avenue

Suite 203

Seattle, WA, 98104

Phone: (206) 343-7340 EXT 1039

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